



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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May 29, 2012

Fabian White
DOC 109152
5501 S 1100 W
Westville, Indiana 46391

Re: Formal Complaint 12-FC-124; Alleged Violation of the Access to Public Records Act by the Clerk of the St. Joseph County Court

Dear Mr. White:

This advisory opinion is in response to your formal complaint alleging the Clerk of the St. Joseph County Court ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Terri J. Rethlake responded to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on April 27, 2012, your written request for a probable cause affidavit was improperly denied by the Clerk

In response to your formal complaint, Ms. Rethlake advised that the Clerk has previously provided all records maintained by the Clerk that are responsive to your request. It is the practice of the courts in St. Joseph County to keep all search warrants in the Court's offices until they are filed with the Clerk. As to your specific request, the search warrant was not filed with the Clerk until January 27, 2012 and the order in the Record of Judgments & Orders did not include a probable cause affidavit. As such, the Clerk cannot provide a record that it does not maintain. In response to your formal complaint, the Clerk has again enclosed all records maintained by the Clerk that are responsive to your request.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." *See* I.C. § 5-14-3-1. The Clerk is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Clerk's public

records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

“[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). The Clerk provided it did not maintain a copy of the probable cause affidavit that you requested. Accordingly, it is my opinion that the Clerk did not violate the APRA by failing to produce a record that it did not maintain.

CONCLUSION

For the foregoing reasons, it is my opinion that the Clerk did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Terri J. Rethlake